Supreme Court, U.S.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SUPERVALU INC. and MORAN FOODS, INC.
d/b/a SAVE-A-LOT, LTD.,
Petitioners,

v.

DISCOUNT FOODS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, makes an agreement to arbitrate a controversy arising out of "a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The question presented here is as follows:

Whether the Alabama Supreme Court, following the minority view, correctly held as a matter of state policy that intentional tort claims may not be arbitrated even though an arbitration agreement, when examined using general principles of contract law, requires arbitration of such a controversy.

PARTIES TO THE PROCEEDING

The parties to the Alabama Supreme Court proceeding are listed below:

Discount Foods, Inc. (Plaintiff);

Supervalu Inc. (Defendant);

Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. (Defendant); and

Gregerson's, Inc. (Defendant).

The parent companies and non-wholly owned subsidiaries of the two corporate petitioners are listed below:

Supervalu Inc.—No parent company

Non-wholly owned subsidiaries:

NAFTA Industries Consolidated, Inc.

Moran Foods, Inc. d/b/a Save-A-Lot, Ltd.

Parent company: Supervalu Operations, Inc.

No non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the decision of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not yet reported. It is reprinted in the appendix to this petition at 1a-6a. The order of the Circuit Court of Calhoun County, Alabama is not reported. It is reprinted in the appendix to this petition at 7a-10a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on February 13, 1998. A timely petition for rehearing was denied on March 20, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case involves the construction of Section 2 of the Federal Arbitration Act (the "FAA" or "the Act"), 9 U.S.C. § 2. The Act requires that an arbitration agreement in a "contract evidencing a transaction involving commerce" be enforced as would any other term in the contract containing the arbitration agreement. 9 U.S.C. § 2. Contrary to ordinary rules of contract interpretation, the Alabama Supreme Court refused to enforce the broad arbitration provision in this case on the grounds that the clause could not encompass the intentional torts alleged by Plaintiff. Pet. App. 4a.

The arbitration agreement at issue is located in a Retailer's Agreement between Plaintiff, Discount Foods, Inc. ("Discount Foods" or "Plaintiff"), an Alabama corporation, and Defendant, Supervalu Inc. ("Supervalu"), a Delaware corporation. Discount Foods operates grocery stores in northern Alabama. The Retailer's Agreement creates numerous rights and obligations for both Discount Foods and Supervalu. For instance, Supervalu must make

available to Discount Foods product lines authorized by Supervalu at the time of each Discount Foods order.[1] The Retailer's Agreement also provides that Supervalu may establish or supply other stores that may compete with Discount Foods' stores. Specifically, the agreement permits Supervalu:

> to enter into Retailer Agreements with other parties at SUPERVALU's sole choice and discretion, including but not limited to SUPERVALU's right to own, operate, finance, serve or supply a store *in competition* with Retailer [Discount Foods] *at any location.*

Pet. App. 14a (emphasis added).[2]

The arbitraiton clause in the Retailer's Agreement between the parties states that, "[a]ny controversy or claim arising between the parties, including, *but not limited to,* disputes relating to this Agreement, shall be resolved by binding arbitration." Pet. App. 16a. The arbitration clause in the Retailer's Agreement continues as follows:

> This agreement to arbitrate shall continue in full force and effect despite the expiration, rescission or termination of this Agreement. All arbitration shall be undertaken pursuant to the Federal Arbitration Act, and the decision of the arbitrator(s) shall be enforceable in any court of competent jurisdiction. The parties knowingly and voluntarily waive their rights to have their dispute tried and adjudicated by a judge or jury. The arbitrator(s) shall apply the

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1 Supervalu's wholly owned subsidiary, Supervalu Holdings, Inc. ("Supervalu Holdings"), operates a warehouse and deals with numerous retailers including Plaintiff. The products which Supervalu provides to retailers include goods manufactured across the United States and shipped to the Supervalu Holdings' warehouse in Anniston, Alabama.

2 Discount Foods also acknowledged in the Retailer's Agreement that "the retail grocery business is highly competitive and a high risk business and that SUPERVALU has not given and cannot give any guaranty of the profitability, if any, of Retailer." Pet. App. 15a-16a.

> Law of the State of Minnesota, except as may be modified by this Agreement. The arbitration shall be held in Minneapolis, Minnesota.

Pet. App. 16a.

Despite the parties' agreement to arbitrate any controversy between them, Discount Foods brought suit against Supervalu, Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. ("Save-A-Lot"), a Missouri corporation,[3] and Gregerson's, Inc. ("Gregerson's"), an Alabama corporation, in the Circuit Court of Calhoun County, Alabama on May 7, 1996. The lawsuit arose out of Supervalu's efforts to establish a Sav-A-Lot grocery store across the street from a Discount Foods store in Anniston, Alabama. Discount Foods submitted a bid to the lessor for the retail location so that Discount Foods could operate a Sav-A-Lot franchise or relocate its store, but the lessor accepted Gregerson's bid. After Gregerson's procured the lease, Supervalu agreed to license Gregerson's to operate a Save-A-Lot store on the property.[4] In its Complaint, Plaintiff alleged three causes of action against Supervalu and Save-A-Lot: (1) tortious interference with contractual and business relations; (2) unfair competition; and (3) disclosure of trade secrets and restraint of trade.

Pursuant to the arbitration provision contained in the Retailer's Agreement, Supervalu and Save-A-Lot filed in the trial court a motion to compel arbitration of Discount Foods' tort claims and to stay litigation pending arbitration. Supervalu and Save-A-Lot specifically relied on and cited Section 2 of the FAA as support for their motion. On June 16, 1996, the Honorable Judge Malcolm B. Street of the Circuit Court of Calhoun County, Ala-

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[3] Save-A-Lot is wholly owned by Supervalu Operations, Inc., a wholly-owned subsidiary of Supervalu.

[4] The lessor of the property is a New York corporation, unrelated to any party and not a defendant in this action. Some of the negotiations regarding the lease were held between New York and Alabama.

bama granted petitioners' Motion to Compel Arbitration. Pet. App. 10a. The Circuit Court found that the arbitration clause agreed to by the parties encompassed all of the Plaintiff's claims, because the provision covers "[a]ny controversy or claim arising between the parties including, but not limited to, disputes relating to this Agreement." Pet. App. 9a. The Court also held that the claims against Supervalu and its subsidiary, Save-A-Lot, were based on the same facts and were inherently inseparable.[5] Accordingly, the Circuit Court ordered Discount Foods to arbitrate its claims against Supervalu and Save-A-Lot. Pet. App. 9a-10a.

On July 15, 1997, Discount Foods filed a motion to reconsider the trial court order compelling arbitration of its claims. Judge Street denied Plaintiff's Motion to Reconsider on July 17, 1997. Pet. App. 11a.

Discount Foods then petitioned the Alabama Supreme Court for a writ of mandamus to compel Judge Street to withdraw his Order granting defendants' Motion to Compel Arbitration. Discount Foods argued that it did not intend to arbitrate intentional torts, but it cited no evidence to support its argument. In their opposition to the writ petition, Supervalu and Save-A-Lot argued that the arbitration clause at issue, which expressly is not limited to contractual disputes, encompassed Discount Foods' tort claims. Supervalu and Save-A-Lot also drew the state Supreme Court's attention to the following portion of the arbitration provision:

> The arbitrator(s) shall have the authority to award actual money damages . . . , but the arbitrator(s) shall not have the authority to award exemplary, punitive or consequential damages, and the parties expressly waive any claimed right to such damages.

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[5] The Circuit Court observed that the Retailer's Agreement involved interstate commerce and was therefore governed by the FAA. Pet. App. 9a.

Pet. App. 17a. Punitive damages typically are available only for intentional torts. Judge Street also answered the petition and explained the reasons for his decision. Pet. App. 20a-25a.

On February 13, 1998, the Alabama Supreme Court refused to enforce the arbitration agreement between the parties and entered an Order granting Discount Foods' petition for a writ of mandamus. While at least acknowledging this Court's mandate regarding arbitration in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Alabama Supreme Court found that (1) Plaintiff's claims did not relate to the parties' contractual relations, and (2) the arbitration provision was not broad enough to encompass arbitration of intentional torts. Pet. App. 4a. Specifically, the Alabama Supreme Court found that "the parties' arbitration provision, although broad, cannot be construed to encompass intentional torts of the parties that are separate and distinct from the dealings that gave rise to the signing of the document containing the arbitration provision in the first place." *Id.* The state's highest court reasoned that,

> [t]o hold otherwise would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have to answer for their actions before a jury of their peers.

Id.

Supervalu and Save-A-Lot timely filed an Application for Rehearing with the Alabama Supreme Court on February 27, 1998. In addition to noting, once again, the breadth and clarity of the arbitration clause, Supervalu and Save-A-Lot explained that Discount Foods' claims concerning the Defendants' efforts to open a grocery store across the street from a Discount Foods' store related to Supervalu's contractual right to establish retail stores that compete with Discount Foods' stores. The Alabama Supreme Court overruled the Application for

Rehearing without written opinion on March 20, 1998. Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

This case involves an important question concerning the scope of Section 2 of the Federal Arbitration Act. Section 2 requires courts to treat arbitration agreements as "valid, irrevocable and enforceable" to the same extent as any other term in the contract which contains the arbitration clause. Although most courts have followed the mandate of Section 2 and have applied general contract principles when determining whether a particular dispute falls within the scope of an arbitration clause, the Alabama Supreme Court, as a matter of public policy, has rejected this procedure when the controversy between the contracting parties gives rise to an intentional tort claim. Thus, contrary to the common law of Alabama regarding the construction of contracts, the Alabama Supreme Court held that the parties' agreement to arbitrate "*any* controversy or claim arising between [them], including, *but not limited to*, disputes relating to this agreement," did not encompass the Plaintiff's intentional tort claims because the arbitration provision, "although broad, cannot be construed to encompass intentional torts of the parties that are separate and distinct from the dealings that gave rise to the signing of the document containing the arbitration provision in the first place." Pet. App. 4a (emphasis added). According to the Alabama court,

> [t]o hold otherwise would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside of the scope of their contemplated dealings, without concern that they might have to answer for their actions before a jury of their peers.

Id.

Alabama's highest court should not be permitted to elevate the state's aversion to predispute arbitration agree-

ments over the "liberal federal policy favoring arbitration agreements" either by misconstruing the interstate commerce test for the application of the FAA [6] or by ignoring Section 2's requirement that arbitration clauses be interpreted according to state law rules of contractual construction. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). The FAA "makes any such state policy unlawful, for that kind of policy would place arbitration clauses on unequal 'footing,' directly contrary to the Act's language and Congress' intent." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995). Congress provided no special rules regarding the arbitration of intentional tort claims, and there is nothing in the history of the FAA which indicates that the omission is accidental.

The Alabama court is not alone in its refusal to permit arbitration of intentional torts. Although most courts have examined the factual allegations of a complaint, rather than the labels assigned to causes of action, to determine whether the parties intended to arbitrate a particular controversy, *see, e.g. Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996), *J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988) and *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987), a few courts have joined Alabama in rejecting parties' efforts to arbitrate intentional tort claims, *see, e.g. Terminix Int'l Co. v. Stabbs*, 930 S.W.2d 345 (Ark. 1996) and *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983). This conflict between federal and state law and policy will not be resolved without direction from this Court. The Congressional intent underlying the FAA will be frustrated until this Court confirms that contracting parties are free to choose which controversies between them will be resolved in arbitration.

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[6] *See, Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

I. THE DECISION BELOW VIOLATES SECTION 2 OF THE FAA AND CONTRAVENES FEDERAL POLICY FAVORING THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

"The basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. at 270 (1995). Congress enacted the Arbitration Act in 1925 to preclude "States from singling out arbitration clauses for suspect status." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 682 (1996). Congress intended for courts to "place such agreements 'upon the same footing as other contracts.' " *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1974)). "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). Section 2 effectuates this intent by requiring courts to recognize arbitration clauses as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

The effect of Section 2 is simple and straightforward: "[a] court may not, . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it construes nonarbitration agreements under state law." *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987). A court must apply "general state-law principles of contract interpretation" to determine whether a dispute between parties to a contract containing an arbitration clause is, in fact, arbitrable. *Volt Information Sciences, Inc.*, 489 U.S. at 475. The Alabama Supreme Court has chosen to disregard the mandate of Section 2 when ordinary rules of

contract interpretation would require parties to arbitrate an intentional tort.

This Court has not addressed the specific issue presented here, namely whether intentional tort claims may be arbitrated if the language of an arbitration clause is broad enough to encompass those claims;[7] however, an examination of the criteria which the Court previously has reviewed in determining the import of Section 2 leads to the conclusion that tort claims, even intentional tort claims, may be arbitrated if the parties to the arbitration provision agreed to do so. Section 2 uses the generic term "controversy;" it does not specifically except tort claims from the controversies which parties may agree to submit to arbitration. In fact, Section 2's distinction between controversies arising out of a contract or transaction and refusals to perform part or all of a contract indicates that Congress contemplated that disputes other than contract claims could be arbitrated. Congress crafted the FAA to allow parties to choose the forum in which disagreements between them would be resolved,

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[7] Although this issue has not been specifically presented to this Court, Petitioners note that this Court has decided other issues in arbitration cases, and the effect of the Court's opinions was that intentional torts were sent into arbitration. In *United Steel Workers of America v. Warrior Gulf Navigation Co.*, this Court stated that "[a]part from matters that the parties specifically exclude, all of the questions on which the parties disgaree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." 863 U.S. 574, 581 (1960) (finding labor dispute, involving allegations of intentional conduct, was not excluded from arbitration); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (ordering arbitration of fraud in the inducement claim). In addition, this Court has held that state laws which prohibit the arbitration of certain types of claims are preempted by the FAA. *Perry v. Thomas*, 482 U.S. at 491 (finding FAA preempted § 229 of the California Labor Code which provided for the maintenance of actions for the collection of wages without regard to an arbitration provision). Court-made rules, like statutory provisions, which disregard arbitration provisions and Congress' mandate, must fall.

and there is nothing in the legislative history of the FAA which suggests that Congress meant to preclude intentional tort claims from arbitration. *See* H.R. Rep. No. 96 at 2 (recognizing the need for enforcement of arbitration agreements in light of the costliness and delays of litigation).

The decision below disregards the plain requirements of Section 2 and the strong federal policy favoring arbitration agreements. The Alabama Supreme Court abdicated state common law principles of contract interpretation for a state policy opposing arbitration of intentional tort claims. Alabama's rules of contract interpretation provide that, "to ascertain the intention of the parties, the plain and clear meaning of the instrument's terms is to be given effect, and the parties are presumed to have intended what the terms clearly state." *Federal Land Bank v. Terra Resources, Inc.*, 373 So. 2d 314, 319-20 (Ala. 1979); *Terry Cove North, Inc. v. Baldwin County Sewer Authority, Inc.*, 480 So. 2d 1171, 1173 (Ala. 1985); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 684 So. 2d 102, 110 (Ala. 1995) ("The answer to [the] question [of whether an arbitration clause applies to a plaintiff's claims] is a matter of contract interpretation, which interpretation is guided by the intent of the parties, and which intent, absent ambiguity in the clause, is evidenced by the plain language of the clause"). Furthermore, "terms should be construed in pari materia and a construction adopted which gives effect to all the terms used." *Federal Land Bank*, 373 So. 2d at 320; *see also, Ryan Warranty Services, Inc. v. Welch*, 694 So. 2d 1271, 1273 (Ala. 1997) ("a contract is to be construed in its entirety and not solely on a single provision").

The language of the arbitration agreement between Discount Foods and Supervalu is plain and clear: "*any* controversy or claim arising between [the parties], including, *but not limited to*, disputes relating to this agreement," must be arbitrated. Thus, the arbitration clause unambiguously encompasses Discount Foods' intentional

tort claims against Supervalu, whether or not those claims specifically relate to the contract between Supervalu and Discount Foods.[8] Moreover, the arbitration clause prohibits the arbitrator from awarding exemplary, punitive, or consequential damages. Pet. App. 17a. Under Minnesota law, the state law which the parties agreed to apply to all arbitration proceedings, punitive damages are not available in simple contract actions; they only may be awarded to punish defendants found guilty of intentional torts. Minn. Stat. Ann. § 549.20 (West 1988); *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46, 52-53 (Minn. 1983). If the parties had not intended for intentional tort claims to be arbitrated, then the punitive damages language in the arbitration agreement would be superfluous. Applying Alabama rules of contract interpretation, it is clear that the parties intended to arbitrate intentional tort claims such as the ones that Discount Foods has asserted againt Supervalu.

Were there any doubt about the parties' intent, the Alabama Supreme Court should have resolved that doubt in favor of arbitration.

> The Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of ar-

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[8] The Alabama Supreme Court held that Discount Foods' tort claims did not relate to the contract between Supervalu and Discount Foods, which the Court characterized as a retail agreement "for the supply of groceries and other inventory items." Pet. App. 2a. This factual finding is incorrect. As Supervalu pointed out to the state court in the company's opposition to Discount Foods' writ petition and in its application for rehearing, the contract between Discount Foods and Supervalu governs many aspects of the relationship between the two parties and specifically permits Supervalu to establish and supply retail stores that compete with Discount Foods stores. Therefore, Discount Foods' tort claims for unfair competition, intentional interference with contractual relations and violation of trade secret and antitrust law arising out of Supervalu's alleged wrongful effort to help establish a competing grocery store across the street from a Discount Foods' store *are* related to and intertwined with the terms of the contract in which the arbitration clause at issue is located.

> bitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense of arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). The Alabama Supreme Court selected its own policy against the use of arbitration agreements over the federal policy favoring them, contrary to this Court's instruction in *Allied-Bruce Terminix*, 513 U.S. at 272 (the FAA "seeks broadly to overcome judicial hostility to arbitration agreements"); *see als, Doctor's Associats, Inc.*, 517 U.S. at 687 n.3 ("a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot' ") (quoting *Perry v. Thomas*, 482 U.S. at 492 n.9). Consequently, review by this Court is appropriate. S. Ct. Rule 10(c).

II. THIS CASE PROVIDES AN OPPORTUNITY FOR THE COURT TO MAKE CONSISTENT FEDERAL LAW CONCERNING THE INTERPRETATION OF ARBITRATION AGREEMENTS

The decision below departs from the holdings of the majority of the Circuit Courts of Appeal and the few state courts which have reviewed the application of the FAA to intentional tort claims. Most courts, applying ordinary rules of contract interpretation, have ordered the arbitration of intentional tort claims where the language of the arbitration clause at issue encompasses those claims. *See, e.g., Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l., Ltd.*, 1 F.3d 639, 642-43 (7th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319-20 (4th Cir. 1988); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 847-56 (2d Cir. 1987); *Aspero v. Shearson American Express, Inc.*, 768 F.2d 106, 107-08 (6th

Cir.), *cert. denied*, 474 U.S. 1026 (1985); *Vukasin v. D.A. Davidson & Co.*, 785 P.2d 713, 718 (Mont. 1990).

In the Eleventh Circuit, "tort claims . . . are not automatically excluded from a contractual arbitration clause." *Gregory v. Electro-Mechanical Corp.*, 83 F.3d at 384. That court of appeals held that claims of fraud, fraudulent inducement, deceit, conversion, breach of good faith and fair dealing and the intentional tort of outrage were arbitrable under an arbitration clause which provided that, "any dispute between any of the Parties which may arise hereunder or under any agreement referred to as an exhibit herein" was subject to arbitration. *Id.* at 383. The court explained that, "[w]hether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted." *Id.* at 384. The Fourth and the Second Circuits agree. Accordingly, the Fourth Circuit recognized that the parties' agreement to arbitrate "[a]ll disputes arising in connection with the present contract" meant that plaintiff's claims for unfair trade practices, intentional and tortious interference with contract and conversion had to be arbitrated. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d at 318; *see also Genesco, Inc.*, 815 F.2d at 846. The Seventh Circuit found that a contractual provision which required the parties to arbitrate "[a]ny disputes arising out of the agreement," was broad enough to include plaintiff's claims for intentional interference with contractual advantage and fraud claims. *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d at 641.[9] "We find, however, that 'arising *out of*' reaches all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the con-

[9] The Alabama Supreme Court specifically rejected the Seventh Circuit's opinion in *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd. Old Republic Ins. v. Lanier*, 644 So. 2d 1258, 1261 (Ala. 1994).

tract per se. . . . We note that contracting parties control their own fate when it comes to deciding which disputes to consign to arbitration." *Id.* at 642-43.

Nevertheless, Alabama does not stand alone in its refusal to permit arbitration of intentional tort claims. For instance, in a decision which post-dates this Court's opinion in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, the Arkansas Supreme Court held that, "the Federal Arbitration Act and the laws of other jurisdictions do not restrict the scope of arbitration as we do in this state. . . . Written agreements to arbitrate have no application to tort matters." *Terminix Int'l Co. v. Stabbs*, 930 S.W.2d 345, 346 (Ark. 1996). The Ninth Circuit has held that claims of conspiracy to induce breach of an agreement and conversion were not arbitrable under contractual language which provided for arbitration of "any dispute arising" under the contract. *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983).

Parties to a contract should have confidence that the contract will be interpreted and enforced according to settled contract principles, as Section 2 requires, rather than according to the vagaries of state policies which restrict the arbitration of tort claims. Otherwise, the principle of freedom of contract, upon which Section 2 rests, is rendered meaningless; the policy underlying the FAA favoring arbitration is emasculated; and parties to a contract are forced to operate without the assurance that the time and expense dedicated to negotiating an arbitration agreement, in reliance upon the FAA, will not be wasted. Direction from this Court on this important issue will restore to parties to arbitration agreements certainty that their intent to arbitrate will be honored and enforced, as Congress direced in Section 2 of the FAA.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JERE F. WHITE, JR.*
WILLIAM H. KING, III
MADELINE H. HAIKALA
LIGHTFOOT, FRANKLIN
& WHITE, L.L.C.
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Attorneys for Petitioners

June 18, 1998

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

[Released Feb. 13, 1998]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1997-98

1962052

EX PARTE DISCOUNT FOODS, INC.
PETITION FOR WRIT OF MANDAMUS
(Re: Discount Foods, Inc.

v.

SUPERVALU, *et al.*)
(Calhoun Circuit Court, CV-96-411)

KENNEDY, JUSTICE.

Discount Foods, Inc., the plaintiff in an action pending in the Calhoun Circuit Court, petitions for a writ of mandamus directing Judge Malcolm Street 1) to withdraw his order granting the defendants' motion to compel arbitration and to stay the proceedings and 2) to enter an order denying the defendants' motion.

On May 7, 1996, Discount Foods sued several related businesses (the Supervalu Company,[1] Save-a-lot, Ltd., and

---

[1] The record indicates that several entities carry the name "Supervalu," "Supervalue Holdings," or similar names. The name "Supervalu" is spelled sometimes "SuperValu."

Gregorson's Holdings, Inc.[2] and various other fictitiously named defendants. The complaint alleged that the defendants had tortiously interfered with Discount Foods' contractual and business relations; unfair competition; and violation of trade secret and antitrust law, with respect to Discount Foods' transaction with a third party to acquire a lease of commercial real estate in Anniston. Before trial, however, the named defendants moved to compel arbitration, based on an arbitration provision contained in retail agreements previously executed between Supervalu and Discount Foods for the supply of groceries and other inventory items to Discount Foods. The arbitration provision provided, in pertinent part:

> "Any controversy or claim arising between the parties, including, but not limited to, disputes relating to this [a]greement, shall be resolved by binding arbitration. . . ."

On June 16, 1997, the trial court granted the motion to compel arbitration as to all claims stated against Supervalu and its subsidiary, Save-A-Lot, and it stayed proceedings in the action.

Discount Foods argues that the trial court erred in compelling arbitration with regard to its present claims against Supervalu and its subsidiary, Save-a-lot. Discount Foods argues that the disputes involved in the present lawsuit are in no way associated with its contractual relations with Supervalu. Moreover, Discount Foods contends that the arbitration provision found in the retail agreements between Discount Foods and Supervalu was not intended by the parties to force arbitration in regard to allegations of intentional torts that are unrelated to their contractual dealings. We agree.

---

[2] The relationship of the defendant Gregorson's Holdings, Inc., to the other defendants and to the arbitration issue presented by this case is unclear. However, given our holding that the court erred in compelling arbitration, we need not ascertain whether Gregorson's would have been subject to the arbitration order.

In *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995), the United States Supreme Court held that the Federal Arbitration Act ("FAA") governs all contracts falling within Congress's power under the Commerce Clause. *Allied-Bruce Terminix* substantially changed the arbitration law of this State, which had previously been declared in Ala. Code 1975, § 8-1-41(3) ("The following obligations cannot be specifically enforced: . . . An agreement to submit a controversy to arbitration[.]"). The federal policy favoring arbitration was recognized by this Court in *Allied-Bruce Terminix Companies v. Dobson*, 684 So. 2d 102 (Ala. 1995), on remand following the United States Supreme Court's *Allied-Bruce Terminix* decision. In that opinion, this Court stated:

> " 'The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitratable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.' "

684 So. 2d 102, 107, quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In *Carl Gregory Chrysler-Plymouth, Inc. v. Barnes*, [Ms. 1960182, June 27, 1997] —— So. 2d —— (Ala. 1997), this Court noted that "[t]he first task of this Court, when reviewing an arbitration provision, is to determine whether the parties agreed to arbitrate the dispute at hand." *Id.* at ——. In noting that "[a] party cannot be required to arbitrate a dispute that he or she did not agree to arbitrate," this Court held that an arbitration provision, although broad, did not extend to a dispute over the intentional tort of a party to a contract when the tort did not concern the negotiations, terms and provisions, or any other aspect of the parties' contractual dealings. *Id.* at ——. In the present case, Discount Foods alleges that Supervalu and its subsidiary Save-a-lot, not unlike the de-

fendant in *Carl Gregory Chrysler-Plymouth*, committed an intentional tort, against Discount Foods. This intentional tort of interference with business relations stemmed not from the parties' contractual dealings, but from an alleged separate and distinct act by Supervalu and Save-a-lot. Although the trial court found that the arbitration provision contained in the retail agreements between the parties was broad enough to compel arbitration of this action, we cannot agree. The parties' arbitration provision, although broad, cannot be construed to encompass intentional torts of the parties that are separate and distinct from the dealings that gave rise to the signing of the document containing the arbitration provision in the first place. To hold otherwise would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have to answer for their actions before a jury of their peers. Discount Foods' petition for the writ of mandamus is, therefore, due to be granted.

The trial court is directed to vacate its order granting the defendants' motion to compel arbitration and staying the proceedings, and to enter an order denying the defendants' motion to compel arbitration and for a stay of the proceedings.

WRIT GRANTED.

Almon, Shores, and Cook, JJ., concur.

Butts, J., concurs in the result.

Hooper, C. J., and Maddox, Houston, and See, JJ., dissent.

HOOPER, CHIEF JUSTICE (dissenting).

I must respectfully dissent. The main opinion concludes that arbitration cannot be compelled, because, it concludes, the arbitration clause is not broad enough to cover a dispute involving an intentional tort. I disagree. The arbitration clause reads: "Any controversy or claim arising between the parties, including, *but not limited to*, disputes relating to this [a]greement, shall be resolved by binding arbitration. . . ." (Emphasis added.) I believe the clause is broad enough to include a dispute that does not directly relate to the parties' contract for the supply of groceries. Given the extraordinary nature of a writ of mandamus, I would hold that the trial judge had a rational basis for granting the motion to compel arbitration. Therefore, I would deny the petition for the writ of mandamus.

HOUSTON, JUSTICE (dissenting).

I would affirm the order of the trial court; therefore, I dissent.

I look to the arbitration provision, which states:

> "Any controversy or claim arising between the parties, including, but not limited to, disputes relating to the [a]greement, shall be resolved by binding arbitration. . . ."

I then look to see if the action involves a controversy between the parties to the arbitration agreement. "Controversy" is defined as "a discussion marked esp. by the expression of opposing views: DISPUTE 2: QUARREL, STRIFE." *Merriam Webster's Collegiate Dictionary* (10th ed. 1997).

The action pending in the Calhoun Circuit Court does involve a controversy between the parties to the arbitration agreement. Therefore, by contract, the parties have agreed to arbitrate that controversy.

Maddox and See, JJ., concur.

[Filed Jun. 16, 1997]

IN THE CIRCUIT COURT
IN AND FOR CALHOUN COUNTY, ALABAMA

Civil Action No. 96-411

DISCOUNT FOODS, INC.,
an Alabama Corporation,
Plaintiff,

v.

SUPERVALU
A Delaware Corporation;
MORAN FOODS, INC. d/b/a SAVE-A-LOT, LTD.,
A Missouri Corporation;
GREGERSON'S INC.,
an Alabama Corporation, *et al.*,
Defendants.

PROPOSED ORDER

This matter came before the Court on the Defendant Supervalu's Motion to Compel Arbitration. Based upon the argument of counsel and authorities submitted, the Court determined that the Motion is due to be granted.

As background, on February 10, 1995, Plaintiff Discount Foods, Inc. ("Discount Foods" or "Plaintiff") entered into a Retailer's Agreement with Defendant Supervalu, Inc. ("Supervalu"). The agreement included a provision entitled "Arbitration" which requires Discount Foods and Supervalu to submit to arbitration "[a]ny controversy or claim arising between the parties, including, but not limited to, disputes relating to this Agreement . . .". The agreement further states that "[t]his agreement to arbitrate shall continue in full force and effect despite the expiration, rescission or termination of this Agreement."

On May 7, 1996, Discount Foods filed Civil Action No. 96-411 in Calhoun County Circuit Court against Supervalu, Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. ("Save-A-Lot") and Gregerson's, Inc. The Complaint alleges, among other things, tortious interference with contractual and business relations, unfair competition and violation of trade secrets and antitrust law in connection with the lease of commercial property to be used by Discount Foods as a retailer of Supervalu.

Under Alabama law, this Court is to determine (1) whether the contract "involves interstate commerce;" and (2) whether the arbitration clause is broad enough to encompass the claims at issue. *Lorance v. Southern Health Corp. of Hamilton, Inc.*, 669 So. 2d 890, 892 (Ala. 1995). An arbitration clause is enforceable under the Federal Arbitration Act if the agreement is contained in a contract that involves interstate commerce, using a "commerce in fact" test. *Coastal Ford, Inc. v. Kidder*, 1997 WL 187098 (Ala. 1997) (noting that previous cases where a court found intrastate activity using the "contemplation of substantial interstate activity" test were rejected by the U. S. Supreme Court in favor of "commerce in fact" test).

If the contract involves interstate commerce, the court next determines:

> "whether the language or 'scope' of the arbitration clause is broad enough to encompass the claims sought to be arbitrated." *Allied Bruce Terminix*, 684 So. 2d at 103 (citation omitted). "Such a determination must begin with a recognition of the federal policy favoring arbitration . . .". *Id.*, 684 So. 2d at 104.

Coastal Ford, 1997 WL 187098 at *3. The question of whether an arbitration clause requires arbitration of a given dispute is a matter of contract interpretation guided by the intent of the parties. *Id.* Absent any ambiguity in the arbitration provision, the parties' intent is evidenced by the plain language in the clause. *Id.*

Finally, a nonsignatory to a contract may nonetheless participate in the arbitration proceeding if the claim against the nonsignatory is encompassed by the arbitration provision and the nonsignatory's participation would more nearly meet the ends of justice. *Ex parte Gray*, 686 So. 2d 251 (Ala. 1996), citing, *Webber, Jackson & Curtis, Inc. v. McNeal*, 143 Ga. App. 579, 239 S.E. 2d 401 (1977) (nonsignatory to the contract containing the arbitration agreement is entitled to the benefit of that agreement). *See also, Ex parte Gates*, 675 So. 2d 371 (Ala. 1996).

In accordance with *Lorance v. Southern Health Corp. of Hamilton, Inc.*, 669 So. 2d 890, 892 (Ala. 1995), this Court analyzed (1) whether the contract "involves interstate commerce;" and (2) whether the arbitration clause is broad enough to encompass the claims at issue. Based upon this analysis, this Court finds that the Agreement involves interstate commerce. Under the Agreement at issue, Supervalu makes available product lines of national manufacturers authorized for sale which the retailer orders through Supervalu. Supervalu then arranges to have the product shipped to its warehouse in Anniston, Alabama, where it is then distributed to Discount Foods, Inc. The Agreement therefore involves interstate commerce.

Pursuant to the rules of contract interpretation, this Court further finds that the claims made by Plaintiff are encompassed by the arbitration clause agreed to by the parties. The provision covers "[a]ny controversy or claim arising between the parties including, but not limited to, disputes relating to this Agreement . . .". This court further finds that the claims against Supervalu and its subsidiary, Save-A-Lot, are based on the same facts and are inherently inseparable.

Accordingly, and based upon the foregoing, the Court, having duly considered the Motion to Compel Arbitration submitted by Supervalu, hereby ORDERS, ADJUDGES AND DECREES as follows:

1) The motion of Supervalu to compel arbitration of Plaintiff's claims is hereby GRANTED;

2) All claims alleged in this action by Discount Foods against Supervalu and Save-A-Lot are to be submitted to arbitration in accordance with the Agreement to Arbitrate;

3) The findings of the arbitrator will be binding upon Discount Foods, Supervalu and Save-A-Lot with respect to any and all claims alleged in this action;

4) This matter is stayed.

DONE and ORDERED, this the 16th day of June, 1997.

/s/ Malcolm B. Street, Jr.
JUDGE MALCOLM B. STREET, JR.

[Filed Jul. 21, 1997]

IN THE CIRCUIT COURT
OF CALHOUN COUNTY

Case 96-411

DISCOUNT FOODS, INC.,
Plaintiff

VS

SUPERVALU, *et al.*,
Defendant(s)

ORDER

Upon consideration of the Plaintiff, Discount Foods, Inc.'s Motion to Reconsider Opposition To Defendant's Motion To Compel Arbitration and for a Stay, the motion is DENIED.

The Clerk is directed to forward a copy of this Order to attorneys of record and/or parties *pro se*.

DONE AND ORDERED July 17, 1997.

/s/ Malcolm B. Street, Jr.
MALCOLM B. STREET, JR.
Circuit Court Judge

IN THE SUPREME COURT OF ALABAMA

March 20, 1998

1962052

EX PARTE DISCOUNT FOODS, INC.
PETITION FOR WRIT OF MANDAMUS
(IN RE: DISCOUNT FOODS, INC.

v.

SUPERVALU, *et al.*)
(Calhoun: CV-96-411)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM—Almon, Shores, Kennedy and Cook, JJ., concur; Butts, J., concurs in result; Hooper, CJ., Maddox, Houston and See, JJ., dissent.

RETAILER'S AGREEMENT
(without Store Identification)

SUPERVALU INC.

General Offices: PO Box 990, Minneapolis, MN 55440

AGREEMENT between SUPERVALU INC. ("SUPERVALU") and the undersigned independent merchant ("Retailer"): in consideration of the mutual promises herein, SUPERVALU and Retailer agree as follows:

A. SUPERVALU WILL:

Make available to Retailer those product lines authorized for sale by SUPERVALU to Retailer at its applicable price and fee schedule in effect at the time Retailer places each order for product. All product lines authorized for sale to Retailer are subject to prior approval by SUPERVALU from time to time. SUPERVALU's obligations under this paragraph are subject to the availability of product; in cases of product shortage, SUPERVALU reserves the right to allocate product at its discretion. All prices, fees, freight, terms and conditions are subject to change by SUPERVALU at any time and from time to time. The Retailer's price for each product purchase, including any fees, freight F.O.B. SUPERVALU Warehouse, and services, will be as stated on the sales documents, including invoices and weekly retailer statements, delivered to Retailer.

B. THE RETAILER WILL:

1. Cooperate with SUPERVALU with respect to ordering and delivery procedures.

2. Pay to SUPERVALU the price for product, including any fees and freight F.O.B. SUPERVALU Warehouse, and services as stated on the sales documents delivered to Retailer. Unless otherwise specified by SUPERVALU, all of Retailer's orders will be accompanied by a signed blank check written in ink and payable to the order of SUPER-

VALU INC. or prearranged authorization for payment by electronic transfer of funds from Retailer's account to SUPERVALU. Notwithstanding any prior representation or agreement to the contrary, SUPERVALU reserves the right at any time to condition delivery of goods or services to Retailer on Retailer's payment of cash on delivery or Retailer's prepayment by certified check, cashier's check, or wire transfer of funds.

3. Acknowledge SUPERVALU's right to choose and select its customers and retailers and to enter into Retailer Agreements with other parties at SUPERVALU's sole choice and discretion, including but not limited to SUPERVALU's right to own, operate, finance, serve or supply a store in competition with Retailer at any location. Further acknowledge that in the event of termination of this agreement, SUPERVALU has no obligations to continue to sell or supply merchandise or services of any kind to the Retailer.

4. Either subscribe to SUPERVALU's retail accounting service thereby furnishing SUPERVALU periodic copies of accounting and sales reports and statements, or maintain its own similar adequate system of accounting and furnish SUPERVALU periodic copies of accounting and sales reports and statements as requested by SUPERVALU.

5. Hold in confidence and not disclose to any other person all information obtained from SUPERVALU regarding price, cost, discounts, merchandising, equipment, sales. and promotions.

6. Not question or contest during or subsequent to the life of this Agreement the validity of SUPERVALU's ownership, right or control of any Trade Name, including trademark, trade name, trade dress, trade style, service mark, medallion mark, emblem, insignia or colors.

C. TERM AND TERMINATION:

This agreement shall become effective on the date appearing below, and shall continue in full force and effect until terminated by either party hereto upon seven (7) days' notice in writing with or without cause. This agreement shall terminate automatically and immediately if either SUPERVALU or Retailer becomes bankrupt or insolvent or makes an assignment for the benefit of creditors, if a receiver is appointed with authority to take possession of all or part of its assets, if Retailer fails to pay its obligations to SUPERVALU when due, or if Retailer becomes incapacitated or is dissolved.

The termination of the relationship between SUPERVALU and Retailer shall not affect the obligation of the Retailer to pay all monies owed to SUPERVALU but unpaid or unpayable at the time of termination.

D. RELATIONSHIP OF PARTIES:

The relationship of the parties is that of arm's length independent buyer and independent seller and not that of partners, joint venturers, principal and agent, fiduciary and beneficiary, franchisor and franchisee, employer and employee, or of special trust and confidence. There shall be no third party beneficiaries to this Agreement. SUPERVALU will not be liable in any manner whatsoever for the debts, liabilities, or obligations incurred by Retailer in the operation of Retailer's business. Retailer shall indemnify and hold SUPERVALU harmless from and against any and all claims, damages, or losses made against or incurred by SUPERVALU, its officers, employees, or agents arising out of the operation of Retailer's business.

E. ACKNOWLEDGEMENT OF RISKS AND RETAILER'S SOLE CONTROL OF ITS BUSINESS:

Retailer acknowledges that (i) the retail grocery business is highely competitive and a high risk business and that SUPERVALU has not given and cannot give any

guaranty of the profitability, if any, of Retailer; (ii) Retailer may be unprofitable and that a part or the whole of Retailer's investment in the store may be lost in the event that Retailer is unprofitable; (iii) the business and profitabiilty of Retailer may be affected by many causes including, without limitation, Retailer's sole control over its methods of operation and business practices, competition, economic conditions, varying availability and price of product, any lack of consumer confidence, uncertainty as to petroleum supplies, inflation, deflation, strikes, embargoes, national emergencies, fire or other casualty, acts of nature and other like or similar causes; (iv) SUPER-VALU has no intention or obligation in any way, directly or indirectly, to provide any additional capital to Retailer so as to refinance Retailer or to provide operating capital to Retailer, or to assist Retailer to obtain further funds.

F. ARBITRATION:

Any controversy or claim arising between the parties, including, but not limited to, disputes relating to this Agreement, shall be resolved by binding arbitration. This agreement to arbitrate shall continue in full force and effect despite the expiration, rescission or termination of this Agreement. All arbitration shall be undertaken pursuant to the Federal Arbitration Act, and the decision of the arbitrator(s) shall be enforceable in any court of competent jurisdiction. The parties knowingly and voluntarily waive their rights to have their dispute tried and adjudicated by a judge or jury. The arbitrator(s) shall apply the Law of the State of Minnesota, except as may be modified by this Agreement. The arbitration shall be held in Minneapolis, Minnesota.

Any party may demand arbitration by sending written notice to the other party. The arbitration and the selection of the arbitrator(s) shall be conducted in accordance with such rules as may be agreed upon by the parties, or, failing agreement within thirty (30) days after arbitration

is demanded, under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), as such rules may be modified by this agreement. In any dispute which involves more than $100,000 in damages, three arbitrators shall be used. Unless the parties agree otherwise, they shall be limited in their discovery to directly relevant documents. Responses or objections to a document request shall be served twenty (20) days after receipt of the request. The arbitrator(s) shall resolve any discovery disputes.

The arbitrator(s) shall have the authority to award actual money damages (with interest on unpaid amounts from the date due), specific performance, and temporary injunctive relief, but the arbitrator(s) shall not have the authority to award exemplary, punitive or consequential damages, and the parties expressly waive any claimed right to such damages. The arbitration shall be of each party's individual claims only, and no claim of any other party shall be subject to arbitration in such proceeding. The costs of arbitration, but not the costs and expenses of the parties, shall be shared equally by the parties. If a party fails to proceed with arbitration, unsuccessfully challenges the arbitration award, or fails to comply with the arbitration award, the other party is entitled to costs, including reasonable attorney's fees, for having to compel arbitration or defend or enforce the award. Except as otherwise required by law, the parties and the arbitrator(s) agree to maintain as confidential all information or documents obtained during the arbitration process, including the resolution of the dispute.

Notwithstanding the above, the parties recognize that certain business relationships could give rise to the need for one or more of the parties to seek emergency, provisional or summary relief to repossess and sell or otherwise dispose of goods and/or fixtures, to prevent the sale or transfer of goods and/or fixtures, to protect real or personal property from injury, or to obtain possession of real

estate and terminate leasehold interests, and for temporary injunctive relief. The parties agree that either shall be entitled to pursue such rights and remedies for emergency, provisional, temporary injunctive or summary relief; however, each party agrees that, immediately following the issuance of any emergency, provisional, temporary injunctive or summary relief, it will consent to the stay of any judicial proceedings pending arbitration of all underlying claims between the parties.

G. MISCELLANEOUS:

This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Retailer and SUPERVALU; provided that neither this Agreement, nor any right, title, interest or obligation hereunder may be assigned or otherwise transferred by Retailer without the prior written consent of SUPERVALU. Each party acknowledges that it has not been induced to enter into this Agreement by any representations or statements, oral or written, not expressly contained herein. This Agreement shall not be deemed or construed to be modified, amended, rescinded, canceled or waived, in whole or in part, other than by written instrument signed by the parties hereto. In the event that any of the terms of this Agreement are in conflict with any rule or law or statutory provision or otherwise unenforceable under the laws or regulations of any government or subdivision thereof, such terms shall be deemed stricken from this Agreement, and this Agreement shall continue in force, unless the invalidity or unenforceability of any such provision thereof dues substantial violence to, or where the invalid or unenforceable provisions comprise an integral part of or are otherwise inseparable from, the remainder of this Agreement. No failure by any party to take any action or assert any right hereunder shall be deemed to be a waiver of such right in the event of the continuation or repetition of the circumstances giving rise to such right. In executing this agreement, Retailer completely and unconditionally acknowledges and

agrees that Retailer has had the opportunity to consult with and receive the advice of Retailer's independent attorney, has read and understood this Agreement and has executed this agreement after independent investigation, voluntarily and without fraud, duress or undue influence, and not in reliance on any inducements, promises or representations by SUPERVALU or its attorneys.

SUPERVALU INC.	Store Name _____
By Isaiah Harris Title Vice President	Store Address 21st Gault Ave. Fort Payne, AL
Date 2-24-95	Retailer's Corporation Name (if applicable): Discount Foods, Inc.
By _____	By /s/ [Illegible] (Retailer's Authorized Signature)
Title _____	Title President
Date _____	Date Feb. 10, 1995 Witness [Illegible]

THE UNIFIED JUDICIAL SYSTEM
SUPREME COURT OF ALABAMA

No. 1962052

EX PARTE DISCOUNT FOODS, INC.
Petitioner,

RE: DISCOUNT FOODS, INC.,
Plaintiff,

vs.

SUPERVALU; *et al.*,
Defendants.

Circuit Court of Calhoun County, Alabama
CV-96-411

ANSWER OF RESPONDENT
MALCOLM B. STREET, Jr.
Circuit Judge

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McBro Planning and Development Co. v. Triangle Electrical Constr. Co., Inc., 741 F.2d 342 (11th Cir. 1984) .....
Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S.Ct. 927 (1983) .....

REASONS WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE

In its petition for Writ of Mandamus, plaintiff Discount Foods, Inc. ("Discount Foods") contends that this Court erred in granting the defendants' motion to compel arbitration. Plaintiff argues in its petition that the scope of the arbitration clause in the contract at issue does not or should not encompass tort claims such as the ones that plaintiff has asserted in its complaint. Plaintiff also argues, to a lesser extent, that the transaction about which it complains does not involve interstate commerce so that the Federal Arbitration Act should not apply in this case. This Court did not abuse its discretion in granting the defendants' motion to compel arbitration; plaintiff's claims against the defendants fall within the scope of the arbitration clause, and the arbitration clause is located in a contract that involves interstate commerce. *Ex parte Alexander*, 558 So. 2d 364, 366 (Ala. 1990) (order granting motion to compel arbitration is reviewed for abuse of discretion).

With respect to the scope of the arbitration clause, the Court had to determine whether the arbitration clause is broad enough to encompass plaintiff's tort claims. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 684 So. 2d 102, 107 (Ala. 1995) ("the preliminary duties of a court ruling on a motion [to compel arbitration] may include determining whether the language or 'scope' of the arbitration clause is broad enough to encompass the claims sought to be arbitrated"); *Lorance v. Southern Health Corp. of Hamilton, Inc.*, 669 So. 2d 890, 892 (Ala. 1995). In making this decision, the Court was mindful of the federal policy favoring arbitration. *Dobson*, 684 So. 2d at 107.

> The Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense of arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941 (1983) (quoted with approval in *Dobson*). The issue is governed by ordinary rules of contract interpretation, and the Court could not compel the parties to arbitrate claims that the parties did not intend to arbitrate. *Dobbs*, 684 So. 2d at 107. The parties' intent, "absent ambiguity in the clause, is evidenced by the plain language of the [arbitration] clause." *Id.* at 110.

Applying these principles, the Court reviewed the arbitration clause at issue which is, as the plaintiff points out, very broad. The clause provides in pertinent part that,

> [a]ny controversy or claim arising between the parties, including, *but not limited to*, disputes relating to this Agreement, shall be resolved by binding arbitration.

Petition for Writ of Mandamus, Exhibit A, ¶ F (emphasis added). Plaintiff has asserted claims against the defendants Supervalu, Sav-A-Lot, Ltd. and Gregerson's, Inc. for tortious interference with contractual and business relations, unfair competition and violation of trade secrets and antitrust law. Plaintiff's claims arise out of Gregorson's alleged effort, with the purported assistance of Supervalu, to establish a competing Sav-A-Lot grocery store across the street from the plaintiff's Discount Foods grocery. Supervalu supplies groceries to both locations. Petition for Writ of Mandamus, Exhibit B.

As the cases which the plaintiff cited to the Court point out, a plaintiff's claims are not automatically excluded from arbitration simply because they sound in tort rather than in contract. *McBro Planning and Development Co. v. Triangle Electrical Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984) ("a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract"); *Dunn Constr. Co., Inc. v. Sugar Beach Condo. Ass'n, Inc.*, 760 F. Supp.

1479, 1485 (S.D. Ala. 1991) ("claims need not be based on breach of contract to be arbitrable. . . tort claims may be subject to arbitration, provided that those claims fall within the scope of the language of the involved arbitration clause").[1] The plain language of the arbitration clause at issue encompasses tort claims. It specifically states that it is not limited to disputes relating to the Retail Agreement in which the arbitration clause appears.[2]

In any event, plaintiff's claims against the defendants are not wholly divorced from the terms of the Retail Agreement.[3] Discount Foods contends that the defendants interfered in Discount Food's lease negotiations for a new location for its Anniston grocery store so that the defendants could establish a retail grocery store which would compete directly with Discount Food's existing store. Petition for Writ of Mandamus, Exhibit B. The agreement in which the arbitration clause at issue is located also provides that Discount Foods,

> [a]cknowledge[s] SUPERVALU's right to choose and select its customers and retailers and to enter into Retailer Agreements with other parties at SUPERVALU's sole choice and discretion, including but not limited to SUPERVALU's right to own, operate, finance, serve or supply a store in competition with Retailer at any location.
>
> . . .
>
> Retailer [i.e. plaintiff] acknowledges that (i) the retail grocery business is highly competitive and a high

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[1] *See also H.L. Fuller Constr. v. Industrial Development Bd.*, 590 So. 2d 218, 222 (Ala. 1991) ("there is authority that supports the submission of fraud claims to arbitration").

[2] Plaintiff presented no evidence to the Court which in any way suggested that the parties' intent regarding the scope of the arbitration clause was contrary to the plain language of the clause.

[3] They are not, as plaintiff discusses in its extreme comparison, tort claims relating to an assault by one of the defendants' employee upon one of the plaintiff's employees.

> risk business and that SUPERVALU has not given and cannot give any guaranty of the profitability, if any, of Retailer.

Petition for Writ of Mandamus, Exhibit 1, ¶ B(3), E. Thus, plaintiff's tort claims relating to the defendants' alleged misconduct in establishing a competing retail grocery are "intertwined with" these unambiguous contract provisions. *Dunn*, 760 F. Supp. at 1485. Those tort claims clearly fall within the scope of the arbitration clause at issue.

With respect to the plaintiff's interstate commerce argument, this Court properly held that an arbitration clause is enforceable if the clause appears "in a contract that involves interstate commerce, using a 'commerce in fact' test." Petition for Writ of Mandamus, Exhibit 5, p. 2; *Coastal Ford, Inc. v. Kidder*, 694 So. 2d 1285 (Ala. 1997). The cases upon which the plaintiff relies in its writ petition support this proposition. *See, Dunn*, 760 F. Supp. at 1482 (in deciding whether claim is subject to arbitration clause, court must consider, in part, whether arbitration clause appears in a "valid, written agreement involving interstate commerce"); *see also, Dobson*, 684 So. 2d at 105.

The Retail Agreement which contains the arbitration clause at issue clearly involves interstate commerce. The contract is between a foreign corporation and an Alabama corporation. It requires Supervalu to make available to Discount Foods retail grocery items from national manufacturers. Those items travel in interstate commerce before they reach their final destination at plaintiff's store. Petition for Writ of Mandamus, Exhibits 1-2. Discount Foods would have no claim against Gregorson's, the party that outbid Discount Foods for the retail location that Discount Foods wanted, were it not for the fact that the Sav-A-Lot franchise that Gregerson's established at the location is related to Supervalu, and Gregerson's allegedly was able to outbid Discount Foods because Supervalu pur-

portedly supplied to Gregersons information that Discount Foods conveyed to Supervalu during the lease negotiations.

Additionally, the Court notes that even the lease negotiations at issue touched upon interstate commerce. According to plaintiff's complaint, a New York entity leased the property that the plaintiff wanted to acquire for a new store. A representative of the New York company travelled to Alabama to negotiate with plaintiff's president for a lease of the location. Discount Foods alleges that it sent a letter to the lessor in New York to accept the terms of the lease which the lessor purportedly offered to Discount Foods at the Alabama meeting between the parties. Petition for Writ of Mandamus, Exhibit 2, ¶¶ 11-15. Had a lease between Discount Foods and the New york entity been finalized, the payments under the lease would have been transmitted from Alabama to New York. During these negotiations. Discount Foods also contends that it talked to Supervalu, a foreign corporation, about the possibility of opening a Sav-A-Lot franchise at the new location rather than a Discount Foods store. *Id.* at ¶ 18. Therefore, from any perspective, the transaction at issue involves interstate commerce so that the FAA governs the defendants' motion to compel arbitration. *Lorance*, 669 So. 2d at 891-92 (transaction did in fact involve interstate commerce where negotiations for contract were conducted between California resident and Georgia corporation, payments made under contract travelled from Georgia to Alabama, and parties often communicated between Alabama and Georgia about the contract).

Because this Court did not abuse its discretion in granting the defendants' motion to compel arbitration, the Court respectfully submits that the plaintiff's Petition for Writ of Mandamus should be DENIED.

/s/ Malcolm B. Street, Jr.
MALCOLM B. STREET, JR.
Circuit Court Judge

FILED
JUL 17 1998
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No. 97-2046

In The
Supreme Court of the United States
October Term, 1997

SUPERVALU INC.
and
MORAN FOODS, INC., d/b/a **SAVE-A-LOT, LTD.**,
Petitioners,
v.
DISCOUNT FOODS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

OPPOSITION OF RESPONDENT DISCOUNT FOODS, INC. TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Contrary to Petitioners' formulation, the only question presented by this case is:

> Whether the Supreme Court of Alabama committed error of constitutional dimension in determining that two parties, signing a supply agreement containing an arbitration clause in February 1995, intended thereby to submit to arbitration a dispute between them concerning an intentional tort, wholly unrelated not only to the specific contract but to their relationship as purchaser and seller, and which had already arisen in August and September of 1994.

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STATEMENT OF THE CASE

Petitioner Supervalu Inc. ("Supervalu") is a supplier of groceries for retail distribution; Respondent Discount Foods, Inc. ("Discount Foods") is a chain of retail grocery stores. On February 24, 1995, Supervalu and Discount Foods executed a contract for the sale and delivery of groceries at one of Respondent's stores: at 21st Street and Gault Avenue in Fort Payne, Alabama. *See* Petition for a Writ of Certiorari ("Cert. Pet."), pp. 13a-19a.

The February 1995 contract, styled a "Retailer's Agreement," describes the relationship between the parties as "that of arm's length independent buyer and independent seller," and disclaims any other kind of relationship, including any "of special trust and confidence." ¶ D; Cert. Pet, p. 15a. It is, in short, a standard contract for the purchase and sale of goods, albeit goods intended for resale at the buyer's retail establishments.[1]

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[1] In an effort to make the Retailer's Agreement -- Petitioner Supervalu's standard form document -- into something more than what it quite obviously is, Petitioners contend that it "creates numerous rights and obligations for" the parties. Cert. Pet., p. 2. Specifically, Petitioners argue that the Agreement "permits" Supervalu to enter into similar contractual arrangements with other retailers, or to compete with Respondent directly on its own account. *Id.*, p. 3. But even by its own language, the Agreement does not "permit" Supervalu to do any such thing. Instead, it includes the obligation that Respondent "[a]cknowledge" Supervalu's rights, which exist entirely independently of the Agreement. *See* ¶ B.3; Cert. Pet., p. 14a.

The contract also contains an arbitration clause. ¶ F; Cert. Pet., pp. 16a-18a. In unusually broad language, the clause begins by providing that

> [a]ny controversy or claim arising between the parties, including, but not limited to, disputes relating to this Agreement, shall be resolved by binding arbitration. . . .

This case is about whether this provision brings within the scope of arbitration a dispute in which Respondent alleges that both Petitioners, together with Gregerson's, Inc.,[2] had committed certain intentional torts against it in August and September 1994, and specifically that they had interfered with Respondent's acquisition of the leasehold for a proposed new retail location in Anniston, Alabama.[3]

The subject matter of *Discount Foods, Inc. v. Supervalu et al.*, No. CV 96-411 (Cir. Ct. Calhoun Cty.) has nothing to do with the Retailer's Agreement of February 1995. Indeed, it has nothing to do with the relationship between Supervalu as "independent seller" and Discount Foods as "independent buyer." The dispute involves the

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[2] Gregerson's, Inc., is a chain of retail grocery stores that is a direct competitor of Respondent in its principal markets in Alabama. A party defendant below, Gregerson's has not joined in Petitioners' submission to this Court.

[3] The complaint filed before the Circuit Court for Calhoun County, Alabama, in Anniston, alleges specifically that the three defendants -- the two Petitioners and Gregerson's -- tortiously interfered with Respondent's contractual and business relations, unfairly competed with Respondent at common law, and negligently or deliberately disclosed its trade secrets. A copy of the Complaint is incorporated herein as an Appendix, pp. 1a-11a, *infra*.

claim that in the summer of 1994, Petitioner Supervalu and its subsidiary, Petitioner Moran Foods, Inc., d/b/a Save-A-Lot, Ltd., conspired together with Respondent's principal competitor to deprive Respondent of an unrelated, potentially profitable business opportunity.

It is this lawsuit that the Calhoun County judge held was subject to the arbitration provisions of the February 1995 Retailer's Agreement. The case was stayed pending arbitration, and Respondent sought a writ of mandamus from the Alabama Supreme Court to set aside the stay. The writ was granted, the State court concluding that "the arbitration provision found in the retail agreement[] between Discount Foods and Supervalu was not intended by the parties to force arbitration in regard to allegations of intentional torts that are unrelated to their contractual dealings." Cert. Pet., p. 2a. The court wrote that "[t]he parties' arbitration provision, although broad, cannot be construed to encompass intentional torts of the parties that are separate and distinct from the dealings that gave rise to the signing of the document containing the arbitration provision in the first place." Cert. Pet., p. 4a.

That is the decision the review of which on certiorari is now sought by Petitioners. Obviously there has been no determination by either court below of whether Respondent's underlying lawsuit is meritorious. No witnesses have been called and no evidence introduced. Whether Petitioners actually are tortfeasors, and Respondent their innocent victim, does not matter at this stage. The only issue resolved by the Supreme Court of Alabama was the arbitrability of this dispute, and that is the only issue now before this Court.

Petitioners contend here that what is at stake is the general question whether parties to an arbitration agreement can **ever** bring alleged intentional torts within its scope, or whether such allegations are somehow always and

automatically excluded. But that is not at all the issue confronted or decided by the court below. The issue, rather, was whether on **these** facts, in signing **this** Agreement, **these** parties intended to require submission of **this** dispute to arbitration. No evidence was presented by the party moving for a stay to show that such was their intention, and the law creates no presumption that parties to a contract providing for arbitration thereby waive all rights they might have to sue one another for anything, including events that had already occurred and were entirely independent of their contractual relationship.

For the following reasons, the decision of the Supreme Court of Alabama was correct, and in any event raises no issues of constitutional dimension that require the intervention of this Court. The Petition for a writ of certiorari should therefore be denied.

REASONS FOR DENYING THE PETITION FOR A WRIT

I. The Court Below Correctly Held As a Matter of Alabama Law That the Parties Never Agreed To Arbitrate Respondent's Intentional Tort Claims

This Court has taught -- in a series of cases that Petitioners somehow neglect to mention -- that "the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate **that dispute**." *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1923 (1995) (emphasis added), *citing Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). It is crystal clear that Petitioner Supervalu and Respondent did not agree, on signing a contract for the

supply of groceries in February 1995, to arbitrate a dispute concerning unrelated intentional torts allegedly committed by one against the other in August and September 1994.

Petitioners, in reality, make no argument that the parties did intend the result that they now urge: that every non-contractual dispute between them of any nature or provenance must be submitted to arbitration. They rely instead -- exclusively -- on the literal language of Petitioner Supervalu's standard form Retailer's Agreement, and specifically on the provision that "**[a]ny** controversy or claim arising between the parties, including, **but not limited to**, disputes relating to this Agreement, shall be resolved by binding arbitration." ¶ F; Cert. Pet., p. 16a, emphasis added. Thus, Petitioners appear to argue that, so long as there is a "dispute" (which there most assuredly is here), and it involves Supervalu and Discount Foods, it is arbitrable.[4]

This argument is not reconcilable with **any** consideration of the intent of the parties. Yet in *First Options*, this Court not only defined the question of the extension of arbitration clauses in terms of a determination of what the parties actually agreed, but deferred to applicable State law principles governing the formation and interpretation of contracts for guidance on the extent to which the parties intentions are determinative in deciding the scope of their agreement. In *First Options* itself, the governing law was that of either Illinois or Pennsylvania, but the Court held that either body of law "would require the court to see whether the parties objectively revealed an intent

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[4] Three Justices of the Alabama Supreme Court appear to have accepted this argument, basing their dissenting opinion on the dictionary definition of the word "dispute," as if that were the only question for consideration. *See* Cert. Pet., p. 6a (Houston, Maddox, and See, JJ., dissenting).

to submit the [issue in dispute] to arbitration." 115 S. Ct. 1920, 1924.[5]

Alabama law, as interpreted and applied by the Supreme Court of that State, similarly looks to parties' intent to ascertain the content of their agreement. In a leading case, for example, following this Court's remand for consideration of precisely this issue, the court quoted the United States Court of Appeals for the 11th Circuit:

> [T]he question of whether a contract's arbitration clause requires arbitration of a given dispute remains a matter of contract interpretation. Such a determination rests on the **intent** of the parties. A party may not be required to arbitrate a dispute it did not agree to arbitrate.

Allied-Bruce Terminix Companies, Inc. v. Dobson, 684 So.2d 102, 107 (Ala. 1995) (emphasis added), *on remand from* 513 U.S. 265 (1995), *quoting Seaboard Coast Line R.R. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982).

Despite, therefore, the oft-enunciated presumption that arbitration is to be favored and that agreements to arbitrate should be liberally construed, *Moses H. Cone*

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[5] The specific question in *First Options* was whether a dispute as to arbitrability was itself arbitrable. But this Court held that the same criteria are to be applied to this question as to any other concerning the scope and coverage of contractual arbitration provisions: these require a determination of what the parties actually agreed. The Court summed up its conclusion in these words, of obvious relevance here: "arbitration . . . is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration." 115 S. Ct. 1920, 1924.

Memorial Hosp. v. Mercury Construction Co., 460 U.S. 1 (1983), the interpretation of the parties' agreement -- not just of their language -- remains the task of the judiciary. Before this Court, Petitioners make no argument that Supervalu and Discount Foods actually contemplated or expressly intended the arbitral resolution of disputes that had already arisen involving unrelated intentional torts. They contend, instead, that the mere use of the words "including, but not limited to, disputes relating to this Agreement," to describe the universe of arbitrable issues, establishes a kind of agreement *sub silentio* to arbitrate **any** contentious issue that might ever arise between those two companies: from a fender-bender between delivery trucks, to the alleged pilferage of trade secrets by a former employee of one later hired by the other, to their disagreement as neighboring landowners over the proper interpretation of local zoning ordinances.[6]

It does not follow from *Moses H. Cone* that there is a presumption in favor of the arbitrability of disputes independent of contractual agreements. It is counterintuitive to infer that, by the simple use of the words "but not limited to" in an arbitration clause, either party intended to waive its right to obtain judicial review of any and all contentious matters that might ever arise (or, here, that may ever have arisen) between them. Nor does any reported case cited by Petitioners suggest the contrary.

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[6] In the courts below, counsel for Respondent suggested that, on Petitioners' theory, suits over an act of arson or assault committed by a disgruntled worker for one party against the premises or personnel of the other would be arbitrable. Far from being ridiculous, as Petitioners there insinuated, this very inference would follow directly from the conclusion urged before this Court, and from the approach to the case taken by the dissenting justices in Alabama.

Petitioners profess to read the opinion below as suggesting an absolute "refusal" of the Alabama courts "to permit arbitration of intentional torts." Cert. Pet., p. 8.[7] They suggest that this Court "has not addressed the specific issue presented here, namely whether intentional tort claims may be arbitrated if the language of an arbitration clause is broad enough to encompass those claims." Cert. Pet., p. 10, footnote omitted. Here, however, Petitioners err twice: this Court **has** spoken to whether arbitration agreements of appropriate scope -- as evidenced by the intent of the parties -- may require arbitration of issues arising outside the terms of the contract itself: an example is *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraud in the inducement held arbitrable). And the issue is not what happens if the agreement to arbitrate "is broad enough" to encompass the non-contractual dispute: it is what results when, as in this case, the agreement to arbitrate does **not** cover the wholly unrelated matter presented in litigation.

The court below did **not** hold that the mere nature of an intentional tort claim between the parties automatically removes it from the coverage of a contractual arbitration clause: it held that on this record, when there is no basis for concluding that the parties explicitly or implicitly agreed to arbitrate this particular dispute, it could not order them to do so.

It is surely true that at one time, the Alabama courts were highly reluctant ever to enforce what they termed "predispute arbitration agreements," in light of a "strong public policy" against their use. *Old Republic Ins. Co. v. Lanier*, 644 So.2d 1258, 1261 (Ala. 1994). But that position is no longer tenable under *Allied-Bruce Terminix*, and the

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[7] Surely there is no theory on which the opinion of the court below can be read as a refusal to **permit** arbitration. The issue is whether arbitration can be **compelled**.

Supreme Court of Alabama has clearly acceded to this Court's recognition of the federal policy generally favoring arbitration in cases reviewable under federal law. Alabama courts have repeatedly acknowledged their abandonment of the previously-articulated State convention, in favor of the strict application of State rules of contract formation. Specifically, in *Ex Parte Gates*, 675 So.2d 371 (Ala. 1996), the court noted that there is no longer a general presumption: *Allied-Bruce Terminix* "substantially changed arbitration law in Alabama," requiring that each case be addressed on its own terms. 675 So.2d 371, 374.

The court below properly applied Alabama law without reference to the pre-*Allied-Bruce Terminix* "strong public policy" against arbitration agreements in general, or against the application of arbitration provisions to intentional torts in particular. And it did so in a manner consistent with this Court's direction in *First Options*.

II. **The Decision of the Supreme Court of Alabama Is Entirely Consistent with the Federal Arbitration Act**

Petitioners argue that the decision of the Alabama Supreme Court violates either the letter or the spirit of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and specifically that it contradicts the "federal policy favoring" arbitration. Cert. Pet., p. 13. Their premise is that the Alabama court, instead of doing what it was supposed to do, blindly invoked "a state policy opposing arbitration of intentional tort claims." *Id.*, p. 11. That the court below neither mentioned such a policy, nor cited to any judicial decision from which such a policy could be inferred, is an inconvenience that Petitioners simply ignore.

Not only did the State court recognize that "any doubts concerning the scope of arbitratable [*sic*] issues

should be resolved in favor of arbitration," *Allied-Bruce Terminix*, 684 So.2d 102, 107, but it made express reference to this Court's articulation of that presumption in *Moses H. Cone Mem. Hosp.*, 460 U.S. 1, 24-25. Far from ignoring the proper rules of contract interpretation, the court below applied them: it asked whether the parties in fact agreed to arbitrate the dispute that was the subject of the underlying lawsuit, and concluded that they had not.

The key to the State court's resolution of the contract interpretation question is this:

> The parties' arbitration provision, although broad, cannot be construed to encompass intentional torts of the parties that are separate and distinct from the dealings that gave rise to the signing of the document containing the arbitration provision in the first place. To hold otherwise would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have to answer for their actions before a jury of their peers.

Cert. Pet., p. 4a.[8] This is not a policy against the arbitrability of intentional torts in general; it is a finding that a broad arbitration clause must nevertheless be read as being limited to disputes -- presumably including disputes over allegations of intentional torts where appropriate -- with at least **some** relation to the contract.

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[8] If anything, the court's reasoning would appear to apply *a fortiori* in a case like this one, in which the alleged intentional tort giving rise to the complaint had **already** occurred when the agreement to arbitrate was signed.

There is, therefore, no inconsistency between the holding below and the Federal Arbitration Act. The presumption in favor of arbitration is only that -- a presumption -- and it does not obtain when there is no evidence that the parties intended a counterintuitive result. Petitioners' suggestion that federal policy is violated whenever, for any reason, a court finds a dispute to be outside the parties' agreement to arbitrate, is wholly unfounded in the Act or in the caselaw, and should be rejected.

The court below properly interpreted Alabama law, but even if it had not done so, there would still surely be no justification for the oversight of this Court. Even assuming that Petitioners were correct in their submission that the bare language of the arbitration clause should oust any consideration of the parties' intent, the proper conclusion would be only that the highest court of the State of Alabama erred in its application of the common law of that State. In no event is there a federal question, a misinterpretation of federal law or policy, a conflict between opinions of United States Courts of Appeals, or any need to establish binding precedent at the level of this Court.

III. **This Court Held in *First Options* That Interpretation of Arbitration Agreements Should Be Performed According to State Law**

Petitioners argue finally that this Court should take the opportunity presented by this case "to make consistent federal law concerning the interpretation of arbitration agreements." Cert. Pet., p. 13. Such a holding, they contend, would create confidence among commercial traders that arbitration clauses

> will be interpreted and enforced according to settled contract principles, as [9 U.S.C. § 2] requires, rather than according to the vagaries of state policies which restrict the arbitration of tort claims.

Cert. Pet., p. 15. To conclude otherwise, they say with perhaps a hint of hyperbole, would "render[] meaningless" "the principle of freedom of contract." *Id.*

The problem with this argument, that national uniformity is required to preserve the sanctity of contracts, is that this Court has already soundly rejected it. *First Options* stands for the proposition that

> [w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally [with a qualification not relevant here] should apply ordinary State law principles that govern the formation of contracts.

115 S. Ct. 1920, 1924, citations omitted. There is, in other words, no need for a consistent federal policy with respect to the interpretation of arbitration clauses, any more than there is such a need with regard to the construction of any other kind of contractual term whose interpretation might be the subject of civil litigation. State law governs such things in our federal system, and the fact -- if it is a fact -- that the highest courts of two sister States might come to different conclusions in a given situation does not compromise the Constitution, or otherwise imply the need to send out for the federal cavalry.

Respondent, of course, does not concede that the Supreme Court of any State would have taken a different view of the case at Bar from that contained in the decision of the Supreme Court of Alabama. In no opinion cited by

Petitioners, and in no reported decision of which undersigned counsel is aware, has a court interpreted an arbitration clause to embrace disputes entirely unrelated to the contract in which it was embedded. Granting Petitioners' point that the words "all disputes arising out of this agreement" are extremely broad, and that they may in the appropriate situation include the claim that the contract was breached, as it were, so brutally as to constitute an intentional tort, there must nevertheless be some connection between the contract and the alleged wrong.[9]

As the U.S. Court of Appeals for the Eleventh Circuit stated in *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996), a case on which Petitioners principally rely, "[t]he law is clear that tort claims and claims other than breach of contract are not automatically excluded from a contractual arbitration clause." 83 F.3d 382, 383. The court below in this case did not hold that there was or should be such an automatic exclusion. But the *Gregory* dispute fell within the scope of the contract, while the instant dispute does not.[10]

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[9] In *American Recovery v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996), for example, the court of appeals directed arbitration of a dispute that did not "implicate" the parties' underlying contract, but which nevertheless had "a significant relationship" to it.

[10] The decision that probably provides the best hope for Petitioners is one they do not even cite: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), in which this Court found Sherman Act claims to be arbitrable. But there is an all-important grounds for distinction: *Mitsubishi*, decided before *First Options*, arose under the contract, the Court expressly finding that the parties had evinced an intent that it be arbitrated.

The Retailer's Agreement between Petitioners and Respondent, which is reprinted at Cert. Pet., pp. 13a-19a, concerns the sale and purchase of groceries for a store in Fort Payne, Alabama. It was signed in February 1995. The dispute brought by Respondent before the courts of Calhoun County concerns allegations that Petitioners competed unfairly with Respondent in August 1994, not by withholding a supply of groceries, or by overcharging, or by delivering inferior goods, but by tortiously arranging for their own retail unit to procure a location in Anniston, Alabama, from which it could attempt to force one of Respondent's stores to incur substantial business losses.

The acquisition of the leasehold in Anniston in 1994 was not contemplated by, and did not come within the scope of, the Retailer's Agreement signed with respect to Fort Payne in 1995. That in the standard-form Agreement Respondent was caused to "acknowledge" that Petitioners were making no assurances of Respondent's profitability hardly can be said to bring an unfair competition lawsuit, as to which the operative events had already occurred, within the scope of the arbitration clause contained in a supply contract for a different location.

The Supreme Court of Alabama applied the rules of contract formation developed by the Alabama courts, just as it did in *Allied-Bruce Terminix*, *supra*, on remand, and in *Carl Gregory Chrysler-Plymouth, Inc. v. Barnes*, 700 So.2d 1358 (Ala. 1997).[11] It asked whether the parties had agreed

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[11] "The first task of this Court, when reviewing an arbitration provision, is to determine whether the parties agreed to arbitrate the dispute at hand. We find no agreement to arbitrate the dispute in this case." 700 So.2d 1358, 1360.

to arbitrate the dispute before the court, and answered that they had not.

No federal law or policy is violated by that holding, and there is no overriding need for the intervention of this Court to "standardize" what it has expressly left to the States to develop, according to their own rules of contract formation, interpretation, and enforcement.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: July 17, 1998

APPENDIX

IN THE CIRCUIT COURT IN AND FOR CALHOUN COUNTY, ALABAMA

DISCOUNT FOODS, INC., an Alabama Corporation,	)	
Plaintiff,	)	
vs.	)	Civil Action No. CV96-411
SUPERVALU, A Delaware Corporation; Moran Foods, Inc. d/b/a SAVE-A-LOT, LTD, A Missouri Corporation; GREGERSON'S, INC., an Alabama Corporation,	)	

There may be other entities whose true names and identities are unknown to the Plaintiff(s) at this time who may be responsible for the claim(s) set forth herein and who may be added by amendment by the Plaintiff (s) when their names and identities are accurately ascertained by further discovery. Until that time, the Plaintiff (s) will designate these parties in accordance with ARCP 9(h). The word "entity" as used herein is intended to refer and include any and all legal entities including persons, any and all forms of partnership, any and all types of corporations and unincorporated associations. The symbol by which these party(ies) defendants are designated is intended to include descriptive characterization of the symbol applies to more than one entity. In the present action, the party Defendants which the Plaintiff(s) must include by descriptive characterization are as follows:

Defendant A, the correct name of the legal entity referred to herein as SuperValu; Defendant B, the correct name of the legal entity referred to herein as Moran Foods, Inc. d/b/a Save-A-Lot Ltd; Defendant C, the correct name of the legal entity referred to herein as Gregerson's, Inc.; Defendant D, E, F, G and H being those persons or entities who manage, supervise, and/or control any aspect of the operations of Defendants A, B, and C having a bearing on this case; Defendants I, J and K, being those individual employees of Defendants A, B and C who made the policy decisions creating the situation made the basis of this lawsuit, all of whose true names are otherwise unknown to the Plaintiffs but will be added by amendment when ascertained,

Defendants.

COMPLAINT

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1. Plaintiff Discount Foods, Inc. ("Discount Foods") is an Alabama Corporation with its principal place of business in Anniston, Calhoun County, Alabama. Discount Foods is in the business of owning and operating retail grocery stores and currently has 11 locations in the States of Alabama and Georgia, employing some 300 people.

2. To the best of Plaintiff's knowledge and belief, Defendant SUPERVALU is a Delaware corporation with its headquarters in Minneapolis, Minnesota. SUPERVALU is involved in numerous aspects of the distribution and marketing of groceries throughout the United States, through divisions and subsidiaries, and in particular a "Southeast Division" which has its offices and

does business in the State of Alabama. Its grocery wholesale operations are among the largest in the world.

3. Defendant Moran Foods, Inc. d/b/a Save-A-Lot Ltd ("Save-A-Lot") is a subsidiary-of Defendant SUPERVALU. It is a Missouri Corporation with its headquarters in St. Louis, Missouri. Save-A-Lot is a franchiser and operator of retail grocery stores and has offices and conducts business throughout the United States and, in particular, in the State of Alabama.

4. Defendant Gregerson's Holdings, Inc. ("Gregerson's") is an Alabama corporation doing business in Calhoun County, Alabama. Gregerson's is a competitor of Plaintiff in numerous retail markets in Northern Alabama, including Anniston and Calhoun County.

5. Defendant A, being the correct name of the legal entity referred to herein as SuperValu; Defendant B, being the correct name of the legal entity referred to herein as Moran Foods, Inc. d/b/a Save-A-Lot Ltd; Defendant 0, being the correct name of the legal entity referred to herein as Gregerson's, Inc. ; Defendants D, E, F, G and H. being those persons or entities who manage, supervise, and/or control any aspect of the operations of Defendants A, B, and C having a bearing on this case; Defendants I, J and K. being those individual employees of Defendants A, B and C who made the policy decisions creating the situation made the basis of this lawsuit.

6. Plaintiffs aver that all fictitious party Defendants of whose true names are otherwise unknown to the Plaintiff at this time will be added by amendment when ascertained.

7. Plaintiff Discount Foods began its business operations on October 5, 1985, and since March, 1987, has managed a grocery outlet at 3103 McClellan Boulevard in Anniston, Calhoun County, Alabama. The freehold is owned by K-Mart, which operates a general merchandise retail store in a neighboring location. The lessee is Defendant SUPERVALU, which, in turn, subleases to Plaintiff.

8. The aforesaid lease and sublease are coterminous. They are scheduled by their terms to expire in November, 1998. For the current calendar year, Plaintiff pays SUPERVALU weekly rental of $1,269.23, from which SUPERVALU pays the lease payment to K-Mart. The difference, an override of approximately $500 per month, is profit to SUPERVALU, which has essentially no expenses in connection with its leasehold.

9. Plaintiff procures its groceries for the aforesaid location from Defendant SUPERVALU's distribution network. Over the last 12 months, Plaintiff's stores have purchased some $29,000,000 in groceries from SUPERVALU.

10. In 1992, Plaintiff learned that K-Mart wished to expand its own retail establishment into the space being subleased by Plaintiff. Discussions among K-Mart, SUPERVALU and Plaintiff regarding the amount of compensation to be paid to the tenant and subtenant in exchange for early departure from the location were never concluded. Throughout, however, it was made clear by K-Mart that, whether or not the parties agreed to a settlement resulting in the landlord receiving vacant possession before the end of the term, the lease and sublease would not be renewed when they expire in 1998.

11. In approximately August, 1994, Plaintiff discussed the possible availability of a location at Anniston Plaza, across the highway from its present location. The Anniston Plaza site was a retail ready space of 15,600 square feet. Plaintiff learned that the lessor of the Anniston Plaza location was to be "Rosen Group Properties ("Rosen"), a New York entity represented locally by Anniston Realty.

12. On or about August, 1994, Plaintiff, through its President, Leamon M. Fite, Jr., indicated to Anniston Realty that it was interested in the Anniston Plaza location. Anniston Realty then arranged a meeting between representatives of Plaintiff and representatives of the owners of the location. Such meeting took place at the Anniston Realty Company offices in August, 1994.

13. Rosen proposed a rental for the location of $2.60 per square foot for five (5) years, with two five-year renewals at $2.85 and $3.10. Given that this was somewhat higher than Plaintiff had anticipated, Mr. Fite asked for an agreement that he be given 14 days within which to "crunch the numbers." The Rosen representative, a Mr. James, accepted this proposal and agreed that if Plaintiff agreed to the rental amount he had proposed, the lease would go to Discount Foods. Mr. James said that the offer would remain open. for 14 days and if Plaintiff accepted the proposal, then "we have a deal," whereupon the parties shook hands to seal their bargain.

14. Further, after Plaintiff's meeting with Rosen, a representative of Anniston Realty telephoned Plaintiff and advised him that Gregerson's had also bid on the location, but Gregerson's bid was much lower than the one Plaintiff had submitted.

15. On September 1, 1994, well within the 14 days referenced in Paragraph 11 above, Plaintiff wrote to Rosen's offices in New York and accepted the offer delivered during the meeting in Anniston, Alabama.

16. However, shortly thereafter, Anniston Realty announced to Plaintiff that Gregerson's had bid a higher rental and se cured the lease, and that Plaintiff's "offer-" was not accepted. Plaintiff then proposed that it would match or exceed any commitment by Gregerson's, but this proposal was rejected.

17. Gregerson's stated to Rosen and to Anniston Realty that it intended to use the Anniston Plaza location for a Safe-A-Lot store. Save-A-Lot has granted to Gregerson's the exclusive right to Save-A-Lot franchise locations in Calhoun County.

18. Plaintiff had indicated to Defendants after the meeting with Rosen in Anniston that it had secured the Anniston Plaza location and wished to discuss with Save-A-Lot the possibility of obtaining a Save-A-Lot franchise. Plaintiff made clear, however, that obtaining such a franchise was not a precondition for its successful operation of the location.

19. Plaintiff believes Defendants would benefit by having Gregerson's rather than Plaintiff in the Anniston Plaza location in at, least the following ways:

a. SUPERVALU would continue to receive. the rental override of $500 per month on the K-Mart location now occupied by Plaintiffs until the lease ends in 1998.

b Save-A-Lot would be assured of a Save-A-Lot franchise store in Anniston, Alabama, from which it would derive profits both from sale of groceries and from franchising fees.

c SUPERVALU would be assured of continued grocery purchases from Plaintiff Is present K-Mart location until 1998. Moreover, the more successfully Plaintiff is able to deal with the competition from Gregerson's, the more groceries Defendants SUPERVALU and SAVE-A-LOT are able to sell at both locations.

20. Defendant Gregerson's would benefit by gaining access to the market for groceries in a location which Plaintiff has spent years building. .

21. In order to secure these benefits to themselves, Defendants interfered with Plaintiff's legitimate expectation of concluding the Anniston Plaza lease, and thereby precluded Plaintiff's operating a successful and profitable retail store at that location. They did so by:

a Providing Save-A-Lot stationary to Gregerson's and permitting Gregerson's to present its bid to Rosen on Save-A-Lot letterhead, although Gregerson's is not a Safe-A-Lot subsidiary or division;

b Encouraging Rosen to believe that Safe-A-Lot and/or SUPERVALU stood behind Gregerson's bid, lending to it a level of apparent financial backing which Plaintiff, a

small local company, could not possibly match;

c On information and belief, divulging to Gregerson's the rental Plaintiff had agreed to pay, thereby permitting Gregerson's to submit a higher bid;

d On information and belief, disseminating and/or intimating to Rosen negative information about Plaintiff, causing Rosen to believe that Plaintiff was financially unstable or would otherwise be unable to fulfill the terms of the lease.

22. The lease for the Anniston Plaza site was thereafter signed between Rosen and Gregerson's and Gregerson's Save-A-franchise operation has opened at that location in the Anniston Plaza on McClellan Boulevard.

23. The loss of the Anniston Plaza location and lease has had a devastating effect on Plaintiff, in that it now has to compete against a grocery literally across the street until 1998, and will lose its present location in the area in 1998. Plaintiff conservatively estimates that it will lose at least 10 to 15 percent of its gross sales due to Defendants, actions, and its store now has a loss of $88,792.85 for the period from June 18, 1995 through December 30, 1995, as compared to a profit during that same period in the previous year.

FIRST CAUSE OF ACTION
Tortious Interference with Contractual and Business Relations

24. Plaintiff realleges and reavers each and every allegation set out in Paragraphs 1 through 21 as though fully set out herein.

25. Defendants jointly and severally tortiously interfered with Plaintiff's contractual and business relations and with its legitimate expectation that if it met the price set by Rosen Group Properties, it would be awarded the lease on the Anniston Plaza location.

26. Defendants were aware of the consequences for Plaintiff of not obtaining the Anniston Plaza location lease and they deliberately and wantonly acted in their own self-interest to thwart Plaintiff's expectation and to maximize their own profit.

27. WHEREFORE, Defendants and each of them are liable to Plaintiff in an amount measured by the actual and provable losses suffered by Plaintiff, as well as punitive and exemplary damages to be established by a jury.

SECOND CAUSE OF ACTION
Unfair Competition: Common Law

28. Plaintiff realleges and reavers each and every allegation set out in Paragraphs 1 through 21 as though fully set out herein.

29. Defendants SUPERVALU and Safe-A-Lot's actions as alleged above and GREGERSON'S use of the rent offer figure in order to outbid constituted the tort of unfair competition at common law, in that Defendants made use of

their superior bargaining position to further their own pecuniary objectives at Plaintiff's expense, in a manner calculated not to achieve competitive advantage, but rather to inflict disproportionate harm to Plaintiff.

30. WHEREFORE, Defendants and each of them are liable to Plaintiff in an amount measured by the actual and provable losses suffered by Plaintiff, as well as punitive and exemplary damages to be established by the jury.

THIRD CAUSE OF ACTION
Trade Secrets; Monopoly; Restraint of Trade

31. Plaintiff realleges and reavers each and every allegation set out in Paragraphs 1 through 28 as though fully set out herein.

32. It is Plaintiff's belief that Defendants SUPERVALU and/or Save-A-Lot, acting negligently, with gross negligence and/or wantonly, revealed sensitive trade secret information with regards to its conversations with Plaintiff and that Defendant Gregerson's acted upon said information in an effort to secure a contract on the premises made the basis of this lawsuit.

33. WHEREFORE, Defendants and each of them are liable to Plaintiff in an amount measured by the actual and provable losses suffered by Plaintiff, as well as punitive and exemplary damages to be established by the jury.

WHEREFORE, Plaintiff Discount Foods, Inc. prays for an award of compensatory damages and punitive damages in an amount to be determined by a jury.

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PLAINTIFFS DEMAND A TRIAL BY A STRUCK JURY IN THE ABOVE- STYLED CAUSE.

_____

_____

_____

Of Counsel

PLEASE SERVE DEFENDANTS:

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No. 97-2046

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SUPERVALU INC. and MORAN FOODS, INC.,
d/b/a SAVE-A-LOT, LTD.,
Petitioners,

v.

DISCOUNT FOODS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONERS' REPLY BRIEF

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OCTOBER TERM, 1997

No. 97-2046

SUPERVALU INC. and MORAN FOODS, INC.,
d/b/a SAVE-A-LOT, LTD.,
Petitioners,

v.

DISCOUNT FOODS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITIONERS' REPLY BRIEF

In the proceeding below, the Alabama Supreme Court erroneously reversed an order of the trial court which required the parties to arbitrate Respondent Discount Foods, Inc.'s ("Discount Foods") intentional tort claims against Petitioners Supervalu Inc. and Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. (collectively "Supervalu").* Alabama's highest court held that although the language of the arbitration agreement between the parties is extremely broad, it does not encompass Discount Foods' intentional tort claims because "to hold otherwise would allow persons signing broad arbitration clauses to commit intentional torts against one another . . . without concern that they might have to answer for their actions before a jury of their peers." Pet. App. 4a. On June 18, 1998, Super-

* The parent companies and non-wholly owned subsidiaries of the Petitioners are listed at p. ii of the Petition.

valu and Save-A-Lot filed a Petition for a Writ of Certiorari with this Court, requesting review of the decision of the Alabama Supreme Court. On July 17, 1998, Discount Foods filed a brief in opposition to the petition. One of Discount Foods' primary arguments is that the parties could not have intended to arbitrate Discount Foods' intentional tort claims because the events which gave rise to those claims occurred before Discount Foods signed the arbitration agreement at issue. As Supervalu demonstrates herein, Discount Foods' argument is irrelevant as a matter of fact and incorrect as a matter of law.

I. THE ARBITRATION AGREEMENT COVERS DISCOUNT FOODS' INTENTIONAL TORT CLAIMS, WHICH DISCOUNT FOODS ASSERTED AGAINST THE DEFENDANTS AFTER THE PARTIES AGREED TO ARBITRATE ANY CLAIM OR CONTROVERSY ARISING BETWEEN THEM.

The arbitration clause in the contract between Discount Foods and Supervalu provides that the parties will arbitrate, "[a]ny controversy or claim arising between [them], including, *but not limited to,* disputes relating to this Agreement." Pet. App. 16a (emphasis added). Discount Foods argues that it could not have intended for its intentional tort claims against Supervalu to be arbitrated because the event out of which the claims arose, Discount Foods' lost bid for a grocery store lease, occurred before the parties signed the Retailer's Agreement that contains the arbitration clause. Opposition pp. 4-5. This issue was not addressed in the proceeding before the Alabama Supreme Court, and it is not cited as a basis for that court's opinion. Even though Discount Foods did not argue this issue in the court below, it is easily refuted.

Discount Foods signed the contract containing the arbitration agreement on February 10, 1995.[1] Pet. App. at

[1] Supervalu executed the Retailer's Agreement on February 24, 1995.

19a. Discount Foods did not file suit against Supervalu and the other defendants until May 7, 1996. Therefore, although the events out of which this controversy arose occurred before the parties executed the Retailer's Agreement, Discount Foods initiated its claims against the defendants after the parties finalized their arbitration agreement. The lawsuit clearly is a "claim arising between the parties," which must be arbitrated, according to the plain language of the arbitration agreement.[2]

II. COURTS REQUIRE PARTIES TO ARBITRATE CLAIMS RELATING TO EVENTS THAT OCCURRED BEFORE THE PARTIES SIGNED THEIR ARBITRATION AGREEMENT IF THE PARTIES INTENDED TO ARBITRATE THOSE DISPUTES.

Courts routinely require arbitration of claims arising out of events that occurred before the parties executed their arbitration agreement if the language of the arbitration clause encompasses those claims. For instance, the Eleventh Circuit Court of Appeals held that a plaintiff's claims were arbitrable under a brokerage contract that included an arbitration agreement even though the claims were based on events which transpired before the parties signed the brokerage contract. *Belke v. Merrill, Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1028 (11th Cir. 1982), *abrogated on other grounds, Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). The court of appeals reasoned that:

> [b]y its own terms the contract between the parties covers not only disputes arising out of the agreement, but in the disjunctive includes "any controversy between us arising *out of your business.*"

Id. (emphasis supplied by the court). The court concluded that the broad arbitration clause, "evince[d] a

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[2] Justice Houston, in his dissent to the Alabama Supreme Court's opinion below, specifically found that Discount Foods' lawsuit against Supervalu and the other defendants constituted a "dispute" which the parties agreed to arbitrate. Pet. App. 6a.

clear intent to cover more than just those matters set forth in the contract." *Id.* The fact that the claims arose from acts occurring before the execution of the brokerage agreement was not relevant. *Id.*; *see also, R.M. Perez & Associates, Inc. v. Welch,* 960 F.2d 534, 539 (5th Cir. 1992) (rejecting plaintiff's contention that his claims were not subject to arbitration because the transactions which provided the basis for his claims were completed before the parties executed the agreement containing an arbitration clause). Thus, as with all other matters relating to arbitration, the parties' intent controls the determination of whether a dispute relating to events which took place before the arbitration agreement was signed falls within the scope of the arbitration clause. *See Dean Witter Reynolds Inc. v. Prouse,* 831 F. Supp. 328, 331 (S.D.N.Y. 1993) ("courts routinely enforce retroactive arbitration agreements when, as in the case at bar, this is consistent with the parties' intentions"); *Clark v. Kidder, Peabody & Co.,* 636 F. Supp. 195, 197 (S.D.N.Y. 1986) ("It is irrelevant that the transaction at issue occurred before this modification [adding the arbitration clause] was effected"); *Shotto v. Laub,* 632 F. Supp. 516, 523 (D. Md. 1986) ("[W]hether plaintiffs signed the agreements before or after opening their accounts, or even before or after the claims arose, does not change the fact that they signed written agreements to arbitrate claims arising out of their account").

III. THE UNAMBIGUOUS LANGUAGE OF THE ARBITRATION AGREEMENT AT ISSUE DICTATES THAT DISCOUNT FOODS MUST ARBITRATE ITS INTENTIONAL TORT CLAIMS AGAINST SUPERVALU.

Supervalu and Discount Foods agreed to arbitrate "[a]ny claim or controversy" arising between them, "including, but not limited to, disputes relating to" the Retailer's Agreement in which the arbitration clause appears. Under Alabama law, the parties' intent must be gleaned from

the plain language of the arbitration agreement. *Allied-Bruce Terminex Cos., Inc. v. Dobson,* 684 So. 2d 102, 110 (Ala. 1995) (question of contract interpretation is guided by parties' intent which is evidenced by plain language of arbitration clause); *see also Ryan Warranty Services, Inc. v. Welch,* 694 So. 2d 1271, 1273 (Ala. 1997) (deriving intent of the parties from the words of the contract). Supervalu and Discount Foods did not limit their agreement to arbitrate to claims relating to events that occurred after execution of the Retailer's Agreement, and they did not exclude intentional torts from the scope of their arbitration agreement. To read these limitations into the agreement would frustrate the parties' intent.[3] The Alabama Supreme Court's refusal to enforce an agreement to arbitrate intentional tort claims because of the court's preference for a judicial forum is improper in the face of the overriding policies behind the Federal Arbitration Act. *See First Options of Chicago, Inc. v. Kaplan,* 115 S. Ct. 1920, 1925 (U.S. 1995) (stating that the basic objective of the FAA is to ensure that commercial arbitration agreements are enforced according to their terms). Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari to correct the decision of the Alabama Supreme Court and confirm the policies underlying the Federal Arbitration Act. An agreement to arbitrate a claim, even an intentional tort claim, should be recognized and enforced. The petition for writ of certiorari should be granted.

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[3] Discount Foods criticizes Supervalu for arguing in favor of a "literal" interpretation of the arbitration agreement between the parties. Opposition at p. 5. Because the language of the agreement is unambiguous, the agreement must be enforced according to its literal terms to effectuate the parties' intent.

Respectfully submitted,

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August —, 1998